

STATE OF WASHINGTON  
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

BLOCK AT BALLARD II, LLC,

Defendant.

No.

CONSENT DECREE RE:  
WESMAR COMPANY, INC. SITE,  
SEATTLE, WASHINGTON

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**I. INTRODUCTION**

A. The mutual objective of the State of Washington, Department of Ecology (Ecology) and Block at Ballard II, LLC (hereinafter Defendant or Block at Ballard II) under this Decree is to provide for remedial action at a facility where there has been a release or threatened release of hazardous substances and to resolve the liability of Defendant for contamination at the Site. This Decree requires Defendant to conduct a cleanup of the Site, consistent with the Cleanup Action Plan (CAP) attached as Exhibit A, that includes the excavation and disposal of polycyclic aromatic hydrocarbon- and metal-contaminated soil; dewatering, treatment, and disposal of arsenic contaminated groundwater; compliance sampling of soil and groundwater; and implementation of an institutional control on the Site, according to the schedule and other requirements identified in this Decree and all exhibits thereto. Ecology has determined that these actions are necessary to protect human health and the environment.

B. The Complaint in this action is being filed simultaneously with this Decree. An Answer has not been filed, and there has not been a trial on any issue of fact or law in this case. However, the Parties wish to resolve the issues raised by Ecology's Complaint. In addition, the Parties agree that settlement of these matters without litigation is reasonable and in the public interest, and that entry of this Decree is the most appropriate means of resolving these matters.

C. By signing this Decree, the Parties agree to its entry and agree to be bound by its terms.

D. By entering into this Decree, the Parties do not intend to discharge non-settling parties from any liability they may have with respect to matters alleged in the Complaint. The Parties retain the right to seek reimbursement, in whole or in part, from any liable persons for sums expended under this Decree.

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1       E.       This Decree shall not be construed as proof of liability or responsibility for any  
2 releases of hazardous substances or cost for remedial action nor an admission of any facts;  
3 provided, however, that Defendant shall not challenge the authority of the Attorney General  
4 and Ecology to enforce this Decree.

5       F.       Successors in Interest and Assigns may become parties to this Decree as  
6 provided in Section XV.

7       G.       The Court is fully advised of the reasons for entry of this Decree, and good  
8 cause having been shown:

9       Now, therefore, it is HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

10                                   **II.     JURISDICTION**

11       A.       This Court has jurisdiction over the subject matter and over the Parties pursuant  
12 to the Model Toxics Control Act (MTCA), Chapter 70.105D RCW. Venue is proper in King  
13 County pursuant to RCW 70.105D.050(5)(b).

14       B.       Authority is conferred upon the Washington State Attorney General by  
15 RCW 70.105D.040(4)(a) to agree to a settlement with any potentially liable person (PLP) if,  
16 after public notice and any required hearing, Ecology finds the proposed settlement would lead  
17 to a more expeditious cleanup of hazardous substances. RCW 70.105D.040(4)(b) requires that  
18 such a settlement be entered as a consent decree issued by a court of competent jurisdiction.

19       C.       Ecology has determined that a release or threatened release of hazardous  
20 substances has occurred at the Site that is the subject of this Decree.

21       D.       Ecology has given notice to Defendant of Ecology's determination that  
22 Defendant is a PLP for the Site, as required by RCW 70.105D.020(21) and WAC 173-340-500.

23       E.       The actions to be taken pursuant to this Decree are necessary to protect public  
24 health and the environment.

25       F.       This Decree has been subject to public notice and comment.  
26

1 G. Ecology finds that this Decree will lead to a more expeditious cleanup of  
2 hazardous substances at the Site in compliance with the cleanup standards established under  
3 RCW 70.105D.030(2)(e) and Chapter 173-340 WAC.

4 H. Defendant has agreed to undertake the actions specified in this Decree and  
5 consents to the entry of this Decree under MTCA.

6 **III. PARTIES BOUND**

7 This Decree shall apply to and be binding upon the Parties to this Decree, their  
8 Successors in Interest and Assigns. The undersigned representative of each party hereby  
9 certifies that he or she is fully authorized to enter into this Decree and to execute and legally  
10 bind such party to comply with this Decree. Defendant agrees to undertake all actions required  
11 by the terms and conditions of this Decree. No change in ownership or corporate status shall  
12 alter Defendant's responsibility under this Decree. Defendant shall provide a copy of this  
13 Decree to all agents, contractors, and subcontractors retained to perform work required by this  
14 Decree, and shall ensure that all work undertaken by such agents, contractors, and  
15 subcontractors complies with this Decree.

16 **IV. DEFINITIONS**

17 Unless otherwise specified herein, all definitions in RCW 70.105D.020 and  
18 WAC 173-340-200 shall control the meanings of the terms in this Decree.

19 A. Site: The Site is referred to as Wesmar Company Inc. Site and is generally  
20 located at 1401 and 1451 Northwest 46th Street, Seattle, Washington. The Site is more  
21 particularly described in the Site Diagram (Exhibit B). The Site constitutes a Facility under  
22 RCW 70.105D.020(5).

23 B. Parties: Refers to the State of Washington, Department of Ecology and Block at  
24 Ballard II.

25 C. Defendant: Refers to Block at Ballard II.  
26

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1       D.     Consent Decree or Decree: Refers to this Consent Decree and each of the  
2 exhibits to this Decree. All exhibits are integral and enforceable parts of this Consent Decree.  
3 The terms "Consent Decree" or "Decree" shall include all exhibits to this Consent Decree.

4       E.     Successors in Interest and Assigns: Refers to any person who acquires an  
5 interest in the Properties through purchase, lease, transfer, assignment, or otherwise, including  
6 those who become a party to this Decree pursuant to Section XV.

7                   **V.     FINDINGS OF FACTS**

8       Ecology makes the following findings of fact without any express or implied  
9 admissions of such facts by Defendant.

10       A.     Block at Ballard II owns the property Parcel #2768303245, listed as 1401 and  
11 1451 Northwest 46th Street, Seattle, Washington, and consisting of approximately 2.34 acres  
12 (hereinafter Property). Portions of the Property are located within 200 feet of the shoreline for  
13 the Lake Washington Ship Canal, a freshwater surface body.

14       B.     The Site is generally located at 1401 and 1451 Northwest 46th Street, Seattle,  
15 Washington. The Site is more particularly described in the Site Diagram (Exhibit B). The Site  
16 constitutes a Facility under RCW 70.105D.020(5).

17       C.     The Site is listed on Ecology's Hazardous Sites List as "Wesmar Company,  
18 Inc." with the Facility Site ID No. 2194. The Site Hazard Assessment ranking for this Site is 5.

19       D.     The Property was previously operated by Wesmar Company, Inc., a chemical  
20 product manufacturer and distributor, and Color Tech, Inc. (aka, Color-Tech, Inc; Colortech,  
21 Inc.), a metal coating service. Historically, the Property is also known to have been operated  
22 by various other industrial entities including: a wooden pipe manufacturing facility (during  
23 which time the wood preservative creosote was used and stored on the Property), a produce  
24 cannery, and a plastic products manufacturing facility.

25       E.     Two underground fuel storage tanks are reported to have been removed from  
26 the Property in 1991.

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1 F. Bridge Group II, LLC (Bridge Group II), which owned the property  
2 immediately prior to Block at Ballard II, retained Sound Environmental Strategies Corporation,  
3 Seattle, Washington (SES) to conduct environmental investigations at the Site and to prepare  
4 technical memoranda documenting the results of those investigations. Beginning in October  
5 2006, SES conducted several investigations as independent actions. These independent  
6 investigations resulted in technical memoranda identifying polynuclear aromatic hydrocarbons  
7 (PAHs) and the metal arsenic as contaminants in soil and groundwater at the Site.

8 G. In October 2007, Ecology determined that Bridge Group II was a PLP for the  
9 Site based on its ownership of the Property.

10 H. In December 2007, Ecology and Bridge Group II entered into an Agreed Order  
11 (DE 5242), which required Bridge Group II (1) to conduct supplemental remedial investigation  
12 work at the Site, (2) to prepare and submit to Ecology a draft Remedial Investigation and  
13 Feasibility Study (RI/FS) reporting the extent and character of contamination at the Site and  
14 proposing the best method of performing an environmental cleanup of the affected areas, and  
15 (3) to prepare and submit to Ecology a draft Cleanup Action Plan (dCAP).

16 I. In accordance with the Agreed Order, Bridge Group II submitted a draft  
17 Remedial Investigation/Feasibility Study (RI/FS) and Cleanup Action Plan, dated September  
18 12, 2008. The RI/FS confirmed the contaminants of PAHs and the metal arsenic in soil and  
19 arsenic in groundwater at the Site, in excess of MTCA cleanup levels. Ecology provided  
20 comments on the draft, and Bridge Group II responded to the comments with appropriate  
21 revisions. Ecology has accepted as final pending public comment the *Remedial*  
22 *Investigation/Feasibility Study and Proposed Cleanup Action* report.

23 J. On January 27, 2009, Block at Ballard II purchased the Property from Bridge  
24 Group II. In February 2009, Ecology notified Block at Ballard II that it was potentially a PLP for  
25 the Site based on its ownership of the Property. Block at Ballard II did not contest PLP status and  
26 on March 17, 2009, Ecology determined Block at Ballard II to be a PLP for the Site.

1 K. Based on the information acquired during the RI, SES designated three remedial  
2 areas on the Site: those portions of the Property that are located within the proposed shoring  
3 system (Area A), those portions of the Property that are located outside the shoring system (Area  
4 B), and the portion of the Site located within the Northwest 46th Street ROW (Area C) (Exhibit B).  
5 The shoring locations were chosen for cost and logistical reasons associated with the  
6 constructability of the planned development and in coordination with the disproportionate cost  
7 analyses conducted as part of the FS.

8 L. The Site is subject to two Master User Permits (MUP) issued by the City of Seattle  
9 on September 29, 2008. MUP 3008041 was issued for the west building (Legal Description: LTS  
10 1-6 & 17-22, MLK 173, GILMAN PARK ADDITION LESS PORTION FOR STREET) with a  
11 Shoreline Substantial Development Permit component. MUP 3008041 will remain active until  
12 September 5, 2013, presuming construction commences by September 5, 2010. MUP 3008040  
13 was issued for the east building (LTS 7-16, BLK 173, GILMAN PARK ADDITION LESS  
14 PORTION FOR STREET. SUBJ TO ESMT OVER SELY POR OF LOT 12 FOR SPUR  
15 STRACT REC #3761195) and will remain active until August 26, 2011, but could be extended for  
16 additional periods upon issuance of a building permit.

17 M. Pursuant to Section IX of Agreed Order No. DE 5242, Ecology finds that Bridge  
18 Group II has completed the actions required by the Agreed Order, and that all of Bridge Group II's  
19 obligations under that Agreed Order are hereby deemed satisfied.

20 **VI. WORK TO BE PERFORMED**

21 This Decree contains a program designed to protect human health and the environment  
22 from the known release, or threatened release, of hazardous substances or contaminants at, on,  
23 or from the Site.

24 A. Defendant will perform a final cleanup action at the Site by implementing the  
25 attached CAP (Exhibit A), which establishes the required remedial action at the Site, in  
26 accordance with the Schedule (Exhibit C) and all other requirements of this Decree.



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B. The cleanup action shall include:

1. Excavation and disposal of contaminated soils and fill materials to meet MTCA cleanup standards for Area A, as described in the CAP.

2. Implementation of Institutional Controls for Areas B and C in accordance with WAC 173-340-440, as described in the CAP.

3. Ongoing groundwater monitoring at the standard point of compliance to monitor contaminant concentrations, as described in the CAP.

C. In order to implement the CAP, Defendant will prepare and submit for Ecology's review and approval all documents necessary to conduct the final cleanup action, such as compliance monitoring plan(s), cleanup action reports, compliance monitoring reports, and as-built reports in accordance with the schedule Exhibit C or any amended schedule pursuant to section XVI. Any such deliverable, once approved by Ecology, becomes an integral and enforceable part of this Decree.

D. Defendant shall prepare a Site Safety and Health Plan in accordance with WAC 173-340-810 that meets all requirements under applicable law, and shall submit this Plan to Ecology for review and comment prior to the commencement of the remedial action.

E. Institutional controls will be recorded on property within the Site as provided for in Exhibit D and in accordance with the requirements specified in Exhibit D.

F. Defendant agrees not to perform any remedial actions outside the scope of this Decree unless the Parties agree to modify the scope of work as identified in the CAP (Exhibit A) and Schedule (Exhibit C) to cover these actions. All work conducted by Defendant under this Decree shall be done in accordance with Chapter 173-340 WAC unless otherwise provided herein.

**VII. DESIGNATED PROJECT COORDINATORS**

The project coordinator for Ecology is:

Sunny Becker  
Washington State Department of Ecology  
Northwest Regional Office (NWRO)  
Toxics Cleanup Program  
3190 160<sup>th</sup> Avenue SE  
Bellevue, Washington 98008  
(425) 649-7187

The project coordinator for Defendant is:

Greg Helland, R.G.  
Office Director  
SCS Engineers  
2405 140<sup>th</sup> Avenue NE, Suite 107  
Bellevue, Washington 98005  
(425) 289-5446  
[ghelland@scsengineers.com](mailto:ghelland@scsengineers.com)

Each project coordinator shall be responsible for overseeing the implementation of this Decree. Ecology's project coordinator will be Ecology's designated representative for the Site. To the maximum extent possible, communications between Ecology and Defendant and all documents, including reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Decree shall be directed through the project coordinators. The project coordinators may designate, in writing, working level staff contacts for all or portions of the implementation of the work to be performed required by this Decree. Any party may change its respective project coordinator. Written notification shall be given to the other party at least ten (10) calendar days prior to the change.

#### **VIII. PERFORMANCE**

All geologic and hydrogeologic work performed pursuant to this Decree shall be under the supervision and direction of a geologist licensed in the State of Washington or under the direct supervision of an engineer registered in the State of Washington, except as otherwise provided for by Chapters 18.220 and 18.43 RCW.

All engineering work performed pursuant to this Decree shall be under the direct supervision of a professional engineer registered in the State of Washington, except as otherwise provided for by RCW 18.43.130.

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1 All construction work performed pursuant to this Decree shall be under the direct  
2 supervision of a professional engineer or a qualified technician under the direct supervision of  
3 a professional engineer. The professional engineer must be registered in the State of  
4 Washington, except as otherwise provided for by RCW 18.43.130.

5 Any documents submitted containing geologic, hydrologic, or engineering work shall  
6 be under the seal of an appropriately licensed professional as required by Chapter 18.220 RCW  
7 or RCW 18.43.130.

8 Defendant shall notify Ecology in writing of the identity of any engineer(s) and  
9 geologist(s), contractor(s) and subcontractor(s), and others to be used in carrying out the terms  
10 of this Decree, in advance of their involvement at the Site.

11 **IX. ACCESS**

12 Ecology or any Ecology authorized representative shall have full authority to enter and  
13 freely move about all property at the Site that Defendant either owns, controls, or has access  
14 rights to at all reasonable times for the purposes of, *inter alia*: inspecting records, operation  
15 logs, and contracts related to the work being performed pursuant to this Decree; reviewing  
16 Defendant's progress in carrying out the terms of this Decree; conducting such tests or  
17 collecting such samples as Ecology may deem necessary; using a camera, sound recording, or  
18 other documentary type equipment to record work done pursuant to this Decree; and verifying  
19 the data submitted to Ecology by Defendant. Defendant shall make all reasonable efforts to  
20 secure access rights for those properties within the Site not owned or controlled by Defendant  
21 where remedial activities or investigations will be performed pursuant to this Decree. Ecology  
22 or any Ecology authorized representative shall give Defendant reasonable notice before  
23 entering any Site property owned or controlled by Defendant unless an emergency prevents  
24 such notice. All Parties who access the Site pursuant to this Section shall comply with any  
25 applicable Health and Safety Plan(s). Ecology employees and their representatives shall not be  
26 required to sign any liability release or waiver as a condition of Site property access.

**X. SAMPLING, DATA SUBMITTAL, AND AVAILABILITY**

With respect to the implementation of this Decree, Defendant shall make the results of all sampling, laboratory reports, and/or test results generated by it or on its behalf available to Ecology. Pursuant to WAC 173-340-840(5), all sampling data shall be submitted to Ecology in both printed and electronic formats in accordance with Section XI (Progress Reports), Ecology's Toxics Cleanup Program Policy 840 (Data Submittal Requirements), and/or any subsequent procedures specified by Ecology for data submittal.

If requested by Ecology, Defendant shall allow Ecology and/or its authorized representative to take split or duplicate samples of any samples collected by Defendant pursuant to the implementation of this Decree. Defendant shall notify Ecology seven (7) days in advance of any sample collection or work activity at the Site. Ecology shall, upon request, allow Defendant and/or its authorized representative to take split or duplicate samples of any samples collected by Ecology pursuant to the implementation of this Decree, provided that doing so does not interfere with Ecology's sampling. Without limitation on Ecology's rights under Section IX (Access), Ecology shall notify Defendant at least five (5) working days prior to any sample collection activity unless an emergency prevents such notice.

In accordance with WAC 173-340-830(2)(a), all hazardous substance analyses shall be conducted by a laboratory accredited under Chapter 173-50 WAC for the specific analyses to be conducted, unless otherwise approved by Ecology.

**XI. PROGRESS REPORTS**

Defendant shall submit to Ecology written Progress Reports that describe the actions taken to implement the requirements of this Decree. Prior to commencement of the Remedial Action, Defendant shall submit brief, quarterly Progress Reports providing the anticipated schedule for commencing the Remedial Action. After commencement of the Remedial Action, Defendant shall submit monthly Progress Reports that include the following:

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1       A.     A written list of on-site activities that have taken place during the previous  
2 month;

3       B.     Detailed description of any deviations from required tasks not otherwise  
4 documented in project plans or amendment requests;

5       C.     Description of all deviations from the scope of work identified in the CAP  
6 (Exhibit A) and Schedule (Exhibit C) during the current month and any planned deviations in  
7 the upcoming month;

8       D.     For any deviations in schedule, a plan for recovering lost time and maintaining  
9 compliance with the schedule;

10      E.     All raw data (including laboratory analyses) received by Defendant during the  
11 past month and an identification of the source of the sample; and

12      F.     A list of deliverables for the upcoming month if different from the schedule.

13       All Progress Reports shall be submitted by the tenth (10<sup>th</sup>) day of the month in which  
14 they are due after the effective date of this Decree. Unless otherwise specified, Progress  
15 Reports and any other documents submitted pursuant to this Decree shall be sent by certified  
16 mail, return receipt requested, to Ecology's project coordinator.

17                   **XII.   RETENTION OF RECORDS**

18       During the pendency of this Decree, and for ten (10) years from the date this Decree is  
19 no longer in effect as provided in Section XXVIII (Duration of Decree), Defendant shall  
20 preserve all records, reports, documents, and underlying data in its possession relevant to the  
21 implementation of this Decree and shall insert a similar record retention requirement into all  
22 contracts with project contractors and subcontractors. Upon request of Ecology, Defendant  
23 shall make all records available to Ecology and allow access for review within a reasonable  
24 time.

**XIII. TRANSFER OF INTEREST IN PROPERTY**

No voluntary conveyance or relinquishment of title, easement, leasehold, or other interest in any portion of the Site shall be consummated by Defendant without provision for continued operation and maintenance of any containment system, treatment system, and/or monitoring system installed or implemented pursuant to this Decree.

Prior to Defendant's transfer of any interest in all or any portion of the Site, and during the effective period of this Decree, Defendant shall provide a copy of this Decree to any prospective purchaser, lessee, transferee, assignee, or other successor in said interest; and, at least thirty (30) days prior to any transfer, Defendant shall notify Ecology of said transfer. Upon transfer of any interest, Defendant shall restrict uses and activities to those consistent with this Consent Decree and notify all transferees of the restrictions on the use of the property.

Successors in Interest and Assigns may request to become parties to this Decree by following the amendment procedures set forth in Section XV. In the event Defendant assigns all of its fee interest to a Successor in Interest or Assign, and that Successor in Interest or Assign becomes a party to this Decree, Ecology may elect, at its sole discretion, to thereafter look first to such successor for performance of the requirements of this Decree, including, but not limited to, performance of the work as described in Section VIII, and payments of Ecology costs described in Section XIII. However, all signatory PLPs remain jointly and severally liable for performance under this Decree.

**XIV. RESOLUTION OF DISPUTES**

A. In the event a dispute arises as to an approval, disapproval, proposed change, or other decision or action by Ecology's project coordinator, or an itemized billing statement under Section XXIV (Remedial Action Costs), the Parties shall utilize the dispute resolution procedure set forth below.

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1           1.       Upon receipt of Ecology's project coordinator's written decision, or the  
2 itemized billing statement, Defendant has fourteen (14) days within which to notify  
3 Ecology's project coordinator in writing of its objection to the decision or itemized  
4 statement.

5           2.       The Parties' project coordinators shall then confer in an effort to resolve  
6 the dispute. If the project coordinators cannot resolve the dispute within fourteen (14)  
7 days, Ecology's project coordinator shall issue a written decision.

8           3.       Defendant may then request regional management review of the  
9 decision. This request shall be submitted in writing to the Northwest Region Toxics  
10 Cleanup Program Section Manager within seven (7) days of receipt of Ecology's  
11 project coordinator's written decision.

12           4.       Ecology's Regional Section Manager shall conduct a review of the  
13 dispute and shall endeavor to issue a written decision regarding the dispute within thirty  
14 (30) days of Defendant's request for review.

15           5.       If Defendant finds Ecology's Regional Section Manager's decision  
16 unacceptable, Defendant may then request final management review of the decision.  
17 This request shall be submitted in writing to the Toxics Cleanup Program Manager  
18 within seven (7) days of receipt of the Regional Section Manager's decision.

19           6.       Ecology's Toxics Cleanup Program Manager shall conduct a review of  
20 the dispute and shall endeavor to issue a written decision regarding the dispute within  
21 thirty (30) days of Defendant's request for review of the Regional Section Manager's  
22 decision. The Toxics Cleanup Program Manager's decision shall be Ecology's final  
23 decision on the disputed matter.

24           B.       If Ecology's final written decision is unacceptable to Defendant, Defendant has  
25 the right to submit the dispute to the Court for resolution. The Parties agree that one judge  
26 should retain jurisdiction over this case and shall, as necessary, resolve any dispute arising

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1 under this Decree. In the event Defendant presents an issue to the Court for review, the Court  
2 shall review the action or decision of Ecology on the basis of whether such action or decision  
3 was arbitrary and capricious and render a decision based on such standard of review.

4 C. The Parties agree to only utilize the dispute resolution process in good faith and  
5 agree to expedite, to the extent possible, the dispute resolution process whenever it is used.  
6 Where either party utilizes the dispute resolution process in bad faith or for purposes of delay,  
7 the other party may seek sanctions.

8 D. Implementation of these dispute resolution procedures shall not provide a basis  
9 for delay of any activities required in this Decree, unless Ecology agrees in writing to a  
10 schedule extension or the Court so orders.

11 **XV. AMENDMENT OF DECREE**

12 The project coordinators may agree to minor changes to the work to be performed  
13 without formally amending this Decree. Minor changes will be documented in writing by  
14 Ecology with copy to the Defendant.

15 Substantial changes to the work to be performed shall require formal amendment of this  
16 Decree. This Decree may only be formally amended by a written stipulation among the Parties  
17 that is entered by the Court, or by order of the Court. Such amendment shall become effective  
18 upon entry by the Court. If material changes to the planned property use occur that would  
19 require substantial changes to the cleanup, any amendment to the scope of the decree will be  
20 handled under this section. Agreement to amend the Decree shall not be unreasonably  
21 withheld by any party.

22 Defendant shall submit a written request for amendment to Ecology for approval. In  
23 the event of material changes to the planned property use requiring substantial changes to the  
24 cleanup, such as may be occasioned by the expiration of the Master Use Permits referenced in  
25 Section V.L, Defendant shall submit a revised scope of work consisting of a MTCA-compliant  
26 cleanup action and schedule consistent with Washington Administrative Code (WAC) 173-



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1 340-360. The existing FS and CAP will be revised in accordance with WAC 173-340-350 and  
2 173-340-380, respectively, and resubmitted to Ecology. Ecology shall indicate its approval or  
3 disapproval in writing and in a timely manner after the written request for amendment is  
4 received. If the amendment to the Decree is a substantial change, Ecology will provide public  
5 notice and opportunity for comment. Reasons for the disapproval of a proposed amendment to  
6 the Decree shall be stated in writing. If Ecology does not agree to a proposed amendment, the  
7 disagreement may be addressed through the dispute resolution procedures described in Section  
8 XIV (Resolution of Disputes).

9 A Successor in Interest or Assign may request, in writing directed to Ecology, to  
10 become a party to the Decree, which may occur upon or after conveyance of the Property  
11 interest to it. Ecology and the Attorney General's office, at their sole discretion, may agree to  
12 amend the Decree to incorporate a Successor in Interest or Assign as a party. The amendment  
13 to the Decree shall be in the form of Exhibit G, "Agreement of Successors in Interests and  
14 Assigns." If the amendment merely adds the party as a signatory, and no substantial changes  
15 are made to the terms of the Decree, then no public notice and comment will be required.  
16 Successors in Interest and Assigns who do not become parties to this Decree will be entitled to  
17 the protections, if any, afforded by RCW 70.105D.040(4)(e) and (f).

### **XVI. EXTENSION OF SCHEDULE**

18  
19 A. An extension of schedule shall be granted only when a request for an extension  
20 is submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the  
21 deadline for which the extension is requested, and good cause exists for granting the extension.  
22 All extensions shall be requested in writing. The request shall specify:

- 23 1. The deadline that is sought to be extended;
- 24 2. The length of the extension sought;
- 25 3. The reason(s) for the extension; and
- 26

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4. Any related deadline or schedule that would be affected if the extension were granted.

B. The burden shall be on Defendant to demonstrate to the satisfaction of Ecology that the request for such extension has been submitted in a timely fashion and that good cause exists for granting the extension. Good cause may include, but may not be limited to:

1. Circumstances beyond the reasonable control and despite the due diligence of Defendant including delays caused by unrelated third parties or Ecology, such as (but not limited to) delays by Ecology in reviewing, approving, or modifying documents submitted by Defendant;

2. Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other unavoidable casualty; or

3. Endangerment as described in Section XVII (Endangerment).

However, neither increased costs of performance of the terms of this Decree nor changed economic circumstances shall be considered circumstances beyond the reasonable control of Defendant.

C. Ecology shall act upon any written request for extension in a timely fashion. Ecology shall give Defendant written notification of any extensions granted pursuant to this Decree. A requested extension shall not be effective until approved by Ecology or, if required, by the Court. Unless the extension is a substantial change, it shall not be necessary to amend this Decree pursuant to Section XV (Amendment of Decree) when a schedule extension is granted.

D. An extension shall only be granted for such period of time as Ecology determines is reasonable under the circumstances. Ecology may grant schedule extensions exceeding ninety (90) days only as a result of:

1. Delays in the issuance of a necessary permit or permit extension which was applied for in a timely manner;

2. Other circumstances deemed exceptional or extraordinary by Ecology; or

3. Endangerment as described in Section XVII (Endangerment).

#### **XVII. ENDANGERMENT**

In the event Ecology determines that any activity being performed at the Site is creating or has the potential to create a danger to human health or the environment, Ecology may direct Defendant to cease such activities for such period of time as it deems necessary to abate the danger. Defendant shall immediately comply with such direction.

In the event Defendant determines that any activity being performed at the Site is creating or has the potential to create a danger to human health or the environment, Defendant may cease such activities. Defendant shall notify Ecology's project coordinator as soon as possible, but no later than twenty-four (24) hours after making such determination or ceasing such activities. Upon Ecology's direction, Defendant shall provide Ecology with documentation of the basis for the determination or cessation of such activities. If Ecology disagrees with Defendant's cessation of activities, it may direct Defendant to resume such activities.

If Ecology concurs with or orders a work stoppage pursuant to this Section, Defendant's obligations with respect to the ceased activities shall be suspended until Ecology determines the danger is abated, and the time for performance of such activities, as well as the time for any other work dependent upon such activities, shall be extended, in accordance with Section XVI (Extension of Schedule), for such period of time as Ecology determines is reasonable under the circumstances.

Nothing in this Decree shall limit the authority of Ecology, its employees, agents, or contractors to take or require appropriate action in the event of an emergency.

**XVIII. COVENANT NOT TO SUE**

A. Covenant Not to Sue: In consideration of Defendant's compliance with the terms and conditions of this Decree, Ecology covenants not to institute legal or administrative actions against Defendant regarding the release or threatened release of hazardous substances covered by this Decree.

This Decree covers only the Site specifically identified in the Site Diagram (Exhibit B) and those hazardous substances that Ecology knows are located at the Site as of the date of entry of this Decree. This Decree does not cover any other hazardous substance or area. Ecology retains all of its authority relative to any substance or area not covered by this Decree.

This Covenant Not to Sue shall have no applicability whatsoever to:

1. Criminal liability;
2. Liability for damages to natural resources; and
3. Any Ecology action, including cost recovery, against PLPs not a party to this Decree.

If factors not known at the time of entry of the settlement agreement are discovered and present a previously unknown threat to human health or the environment, the Court shall amend this Covenant Not to Sue.

B. Reopeners: Ecology specifically reserves the right to institute legal or administrative action against Defendant to require it to perform additional remedial actions at the Site and to pursue appropriate cost recovery, pursuant to RCW 70.105D.050 under the following circumstances:

1. Upon Defendant's failure to meet the requirements of this Decree, including, but not limited to, failure of the remedial action to meet the cleanup standards identified in the CAP (Exhibit A);

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2. Upon Ecology's determination that remedial action beyond the terms of this Decree is necessary to abate an imminent and substantial endangerment to human health or the environment;

3. Upon the availability of new information regarding factors previously unknown to Ecology, including the nature or quantity of hazardous substances at the Site, and Ecology's determination, in light of this information, that further remedial action is necessary at the Site to protect human health or the environment; or

4. Upon Ecology's determination that additional remedial actions are necessary to achieve cleanup standards within the reasonable restoration time frame set forth in the CAP.

C. Except in the case of an emergency, prior to instituting legal or administrative action against Defendant pursuant to this Section, Ecology shall provide Defendant with fifteen (15) calendar days notice of such action.

**XIX. CONTRIBUTION PROTECTION**

With regard to claims for contribution against Defendant, the Parties agree that Defendant is entitled to protection against claims for contribution for matters addressed in this Decree as provided by RCW 70.105D.040(4)(d).

**XX. LAND USE RESTRICTIONS**

Defendant shall record an Environmental Covenant (Exhibit D) with the office of the King County Auditor within ten (10) days of the completion of the remedial action. The Restrictive Covenant shall restrict future uses of the Site, as specified in the CAP (Exhibit A). Defendant shall provide Ecology with a copy of the recorded Environmental Covenant within thirty (30) days of the recording date.

**XXI. INDEMNIFICATION**

Defendant agrees to indemnify and save and hold the State of Washington, its employees, and agents harmless from any and all claims or causes of action for death or

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injuries to persons or for loss or damage to property to the extent arising from or on account of acts or omissions of Defendant, its officers, employees, agents, or contractors in entering into and implementing this Decree. However, Defendant shall not indemnify the State of Washington nor save nor hold its employees and agents harmless from any claims or causes of action to the extent arising out of the negligent acts or omissions of the State of Washington, or the employees or agents of the State, in entering into or implementing this Decree.

**XXII. COMPLIANCE WITH APPLICABLE LAWS**

A. All actions carried out by Defendant pursuant to this Decree shall be done in accordance with all applicable federal, state, and local requirements, including requirements to obtain necessary permits, except as provided in RCW 70.105D.090. The permits or other federal, state or local requirements that the agency has determined are applicable and that are known at the time of entry of this Decree have been identified in the CAP (Exhibit A).

B. Pursuant to RCW 70.105D.090(1), Defendant is exempt from the procedural requirements of Chapters 70.94, 70.95, 70.105, 77.55, 90.48, and 90.58 RCW and of any laws requiring or authorizing local government permits or approvals. However, Defendant shall comply with the substantive requirements of such permits or approvals. The exempt permits or approvals and the applicable substantive requirements of those permits or approvals, as they are known at the time of entry of this Decree, have been identified in the CAP (Exhibit A).

Defendant has a continuing obligation to determine whether additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Decree. In the event either Ecology or Defendant determines that additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Decree, it shall promptly notify the other party of this determination. Ecology shall determine whether Ecology or Defendant shall be responsible to contact the appropriate state and/or local agencies. If Ecology so requires, Defendant shall promptly consult with the appropriate state and/or local agencies and provide Ecology with written

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1 documentation from those agencies of the substantive requirements those agencies believe are  
2 applicable to the remedial action. Ecology shall make the final determination on the additional  
3 substantive requirements that must be met by Defendant and on how Defendant must meet  
4 those requirements. Ecology shall inform Defendant in writing of these requirements. Once  
5 established by Ecology, the additional requirements shall be enforceable requirements of this  
6 Decree. Defendant shall not begin or continue the remedial action potentially subject to the  
7 additional requirements until Ecology makes its final determination.

8 C. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the  
9 exemption from complying with the procedural requirements of the laws referenced in RCW  
10 70.105D.090(1) would result in the loss of approval from a federal agency that is necessary for  
11 the State to administer any federal law, the exemption shall not apply and Defendant shall  
12 comply with both the procedural and substantive requirements of the laws referenced in RCW  
13 70.105D.090(1), including any requirements to obtain permits.

### **XXIII. REMEDIAL ACTION COSTS**

14  
15 Defendant shall pay to Ecology costs incurred by Ecology pursuant to this Decree and  
16 consistent with WAC 173-340-550(2). These costs shall include work performed by Ecology  
17 or its contractors for, or on, the Site under Chapter 70.105D RCW, including remedial actions  
18 and Decree preparation, negotiation, oversight and administration. These costs shall include  
19 work performed both prior to and subsequent to the entry of this Decree. Ecology has  
20 accumulated \$4,713.76 in remedial action costs related to this facility as of September 10,  
21 2009. Payment for this amount shall be submitted by December 9, 2009. For all costs incurred  
22 subsequent to September 10, 2009, defendant shall pay the required amount within thirty (30)  
23 days of receiving from Ecology an itemized statement of costs that includes a summary of  
24 costs incurred, an identification of involved staff, and the amount of time spent by involved  
25 staff members on the project. A general statement of work performed will be provided upon  
26 request. Itemized statements shall be prepared quarterly. Pursuant to WAC 173-340-550(4),

1 failure to pay Ecology's costs within ninety (90) days of receipt of the itemized statement of  
2 costs will result in interest charges at the rate of twelve percent (12%) per annum, compounded  
3 monthly.

4 In addition to other available relief, pursuant to RCW 70.105D.055, Ecology has  
5 authority to recover unreimbursed remedial action costs by filing a lien against real property  
6 subject to the remedial actions.

#### 7 **XXIV. IMPLEMENTATION OF REMEDIAL ACTION**

8 If Ecology determines that Defendant has failed without good cause to implement the  
9 remedial action, in whole or in part, Ecology may, after notice to Defendant, perform any or all  
10 portions of the remedial action that remain incomplete. If Ecology performs all or portions of  
11 the remedial action because of Defendant's failure to comply with its obligations under this  
12 Decree, Defendant shall reimburse Ecology for the costs of doing such work in accordance  
13 with Section XXIV (Remedial Action Costs), provided that Defendant is not obligated under  
14 this Section to reimburse Ecology for costs incurred for work inconsistent with or beyond the  
15 scope of this Decree.

16 Except where necessary to abate an emergency situation, Defendant shall not perform  
17 any remedial actions at the Site outside those remedial actions required by this Decree, unless  
18 Ecology concurs, in writing, with such additional remedial actions pursuant to Section XV  
19 (Amendment of Decree).

#### 20 **XXV. PERIODIC REVIEW**

21 As remedial action, including groundwater monitoring, continues at the Site, the Parties  
22 agree to review the progress of remedial action at the Site, and to review the data accumulated  
23 as a result of monitoring the Site as often as is necessary and appropriate under the  
24 circumstances. At least every five (5) years after the initiation of cleanup action at the Site the  
25 Parties shall meet to discuss the status of the Site and the need, if any, for further remedial  
26 action at the Site. At least ninety (90) days prior to each periodic review, Defendant shall



1 submit a report to Ecology that documents whether human health and the environment are  
2 being protected based on the factors set forth in WAC 173-340-420(4). Ecology reserves the  
3 right to require further remedial action at the Site under appropriate circumstances. This  
4 provision shall remain in effect for the duration of this Decree.

5 **XXVI. PUBLIC PARTICIPATION**

6 A Public Participation Plan (Exhibit E) is required for this Site. Ecology shall review  
7 the existing Public Participation Plan to determine its continued appropriateness and whether it  
8 requires amendment.

9 Ecology shall maintain the responsibility for public participation at the Site. However,  
10 Defendant shall cooperate with Ecology, and shall:

11 A. If agreed to by Ecology, develop appropriate mailing list, prepare drafts of  
12 public notices and fact sheets at important stages of the remedial action, such as the submission  
13 of work plans, remedial investigation/feasibility study reports, cleanup action plans, and  
14 engineering design reports. As appropriate, Ecology will edit, finalize, and distribute such fact  
15 sheets and prepare and distribute public notices of Ecology's presentations and meetings.

16 B. Notify Ecology's project coordinator prior to the preparation of all press  
17 releases and fact sheets, and before major meetings with the interested public and local  
18 governments. Likewise, Ecology shall notify Defendant prior to the issuance of all press  
19 releases and fact sheets, and before major meetings with the interested public and local  
20 governments. For all press releases, fact sheets, meetings, and other outreach efforts by  
21 Defendant that do not receive prior Ecology approval, Defendant shall clearly indicate to its  
22 audience that the press release, fact sheet, meeting, or other outreach effort was not sponsored  
23 or endorsed by Ecology.

24 C. When requested by Ecology, participate in public presentations on the progress  
25 of the remedial action at the Site. Participation may be through attendance at public meetings  
26 to assist in answering questions, or as a presenter.

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D. When requested by Ecology, arrange and/or continue information repositories at the following locations:

1. Ballard Branch Public Library  
5614 22<sup>nd</sup> Avenue NW  
Seattle, Washington 98107  
(206) 684-4089
2. Ecology's Northwest Regional Office  
3190 160<sup>th</sup> Avenue SE  
Bellevue, Washington 98008  
(425) 649-7190

At a minimum, copies of all public notices, fact sheets, and press releases; all quality assured monitoring data; remedial actions plans and reports, supplemental remedial planning documents, and all other similar documents relating to performance of the remedial action required by this Decree shall be promptly placed in these repositories.

**XXVII. DURATION OF DECREE AND CERTIFICATIONS BY ECOLOGY**

The remedial program required pursuant to this Decree shall be maintained and continued until Defendant has received written notification from Ecology, in a Certificate of Completion, that the requirements of this Decree have been satisfactorily completed. Defendant may then request to have the Site removed from the Hazard Sites List, pursuant to WAC 173-340-330(7). This Decree shall remain in effect until dismissed by the Court. When dismissed, Section XVIII (Covenant Not to Sue) and Section XIX (Contribution Protection) shall survive.

**XXVIII. CLAIMS AGAINST THE STATE**

Defendant hereby agrees that it will not seek to recover any costs accrued in implementing the remedial action required by this Decree from the State of Washington or any of its agencies; and further, that Defendant will make no claim against the State Toxics Control Account or any local Toxics Control Account for any costs incurred in implementing this Decree. Except as provided above, however, Defendant expressly reserves its right to seek to

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1 recover any costs incurred in implementing this Decree from any other PLP. This Section does  
2 not limit or address funding that may be provided under Chapter 173-322 WAC.

3 **XXIX. EFFECTIVE DATE**

4 This Decree is effective upon the date it is entered by the Court.

5 **XXX. WITHDRAWAL OF CONSENT**

6 If the Court withholds or withdraws its consent to this Decree, it shall be null and void  
7 at the option of any party and the accompanying Complaint shall be dismissed without costs  
8 and without prejudice. In such an event, no party shall be bound by the requirements of this  
9 Decree.

10 STATE OF WASHINGTON  
11 DEPARTMENT OF ECOLOGY

ROBERT M. MCKENNA  
Attorney General


12 \_\_\_\_\_  
13 Robert Warren  
14 Northwest Region Section Manager  
Toxics Cleanup Program  
(425) 649-7054

\_\_\_\_\_  
Allyson S. Zipp  
Assistant Attorney General  
(360) 586-2669

15 Date: \_\_\_\_\_

Date: \_\_\_\_\_

16 BLOCK AT BALLARD II, LLC

17   
18 \_\_\_\_\_  
19 Name: JAY FISHER  
Title: Investment Director  
20 Telephone: 515-248-3076

21 Date: 9/9/09

22 ENTERED this \_\_\_\_\_ day of \_\_\_\_\_ 2009.

23 \_\_\_\_\_  
24 JUDGE  
25 King County Superior Court  
26

